UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

C2G LTD. CO.	)	
	)	
and	)	**Cases 19-CA-163444**
	)	**19-CA-169910**
GENERAL TEAMSTERS LOCAL 959, STATE OF ALASKA, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS	)	

RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent C2G Ltd. ("Respondent" or "C2G") excepts to the Decision and Recommended Order (JD-(SF)-21-18) of Administrative Law Judge, Eleanor Laws ("ALJ") in the above-styled case as follows:

A. EXCEPTIONS TO THE ALJ'S ULTIMATE FINDINGS, CONCLUSIONS, ORDER AND REMEDY.

1. C2G excepts to the ALJ's findings and conclusion that "General Counsel has met her burden to prove the Respondent violated Section 8(a)(5) and (1) by unilaterally rescinding the first year of employees' vacation accrual, and then by recalculating employee's vacation accrual at a different rate." Decision p. 11, lines 11-14. The ALJ should have concluded that these allegations were not supported by substantial evidence on the record as a whole, and that C2G did not violate the Act. Accordingly, the ALJ should have dismissed this allegation of the Amended Complaint (i.e., dismissed ¶¶ 7(b), (d), (f) and 10.) In sum, C2G acted in accordance with the literal language of the parties' collective bargaining agreement ("CBA") as interpreted by Arbitrator Ahearn (JX-4, pp. 22-23) and the reasonable good faith belief of Tom Copeland (C2G's owner) that he hired the impacted employees as seasonal part-time employees (Bd. TR

74:17-TR 76:8; TR 45:3-5; TR 61:3-7) and that Carol Huggins had erroneously, but without his authorization, made an honest mistake regarding vacation accrual. (Bd. TR 54:1-20; TR 56:5 to 58:2; 105:13 to TR 106:16; JX-5, TR 406:17-22; 434:23-435:6; 425:8-22), which he needed to rectify. JX-5, TR 421:1-424:2. Specific grounds with citation to the record are particularized in greater detail below.

2. C2G excepts to the ALJ's findings and conclusions "that the General Counsel has met her burden to reliance [sic] on the maintained offer letters violated Section 8(a)(1) as of September 4, 2015." Decision, p. 17, lines 4-5. The ALJ should have concluded that the allegations concerning the relevant offer letters were not supported by substantial evidence on the record as a whole and that C2G did not violate the Act. Accordingly, the ALJ should have dismissed this allegation of the Amended Complaint (i.e., dismissed ¶¶ 6 and 8). In sum, C2G's usage of the offer letters was in accord with the CBA as interpreted by Arbitrator Snider. (JX-7). See also, Bd. TR 60:9 to TR 61:2, JX-6, Jt. Ex. 1 thereto, Section 2.01. Specific grounds with citation to the record are particularized in greater detail below.

3. C2G excepts to the ALJ's implicit finding and conclusion that C2G unlawfully relied upon certain offer letters to make a "unilateral change to bargaining-unit employees' vacation accrual rates" in violation of Section 8(a)(5) and 8(a)(1) of the Act. Decision, p. 17, lines 9-12. The ALJ should have concluded that these allegations were not supported by substantial evidence on the record as a whole, and that C2G did not violate the Act. Accordingly, the ALJ should have dismissed this allegation of the Amended Complaint (i.e., dismissed ¶¶ 6(a), (b) and 10). In sum, C2G acted in accordance with the literal language of the parties' CBA as interpreted by Arbitrators Ahearn and Snider. JX-4, JX-7. See also, Bd. TR

60:9 to 61:2. Moreover, Copeland's actions regarding when vacation accrual began under Section 18.02 was based upon the language of the CBA, not the offer letters. Specific grounds with citation to the record are particularized in greater detail below.

4. C2G excepts to the ALJ's finding and conclusion that the "General Counsel has met her burden to prove [C2G] engaged in direct dealing." Decision, p. 17, lines 37-38. The ALJ should have concluded that these allegations were not supported by substantial evidence on the record as a whole, and that C2G did not violate the Act. Accordingly, the ALJ should have dismissed this allegation of the Amended Complaint (i.e., dismissed ¶¶6(a)(c) and 10). In sum, C2G acted in conformity with the parties' CBA as interpreted by Arbitrator Snider and always recognized the supremacy of the CBA and the Union's role in negotiating same. JX-7, Bd. TR 60:9 to 61:2; JX-3, UX-26, 31, 35; JX-2, UX-35, handbook signature page; JX-6, Jt. Ex. -1 thereto, Section 5.02; Bd. TR 58:5-59:2, Bd. TR 91:4-11; Bd. TR 78:10-TR 79:11. Specific grounds with citation to the record are particularized in greater detail below.

5. C2G excepts to the ALJ's first three "Conclusions of Law." Decision, p. 18, lines 3-14. C2G (a) did not make unlawful unilateral changes to bargaining-unit employees' terms and conditions of employment, it acted in accordance with the CBA as interpreted by Arbitrators Snider and Ahearn (JX's-4 and JX-71); likewise (b) it did not engage in direct dealing with bargaining-unit employees, it acted in accordance with the CBA as interpreted by Arbitrator Snider (JX-7) and (c) the offer letters would not coerce reasonable bargaining-unit employees "in their Section 7 rights." Decision, p. 18, line 8. See, JX-4; JX-7; Bd. TR 60:9-61:2; JX-3, UX-26, 31, 35; JX-2, U-35 (signature page); JX-6, Jt. Ex.-1 thereto, Section 5.02; Bd. TR 58:5-59:2;

TR 78:10-79:11; Bd. TR 91:4-11. Each of these allegations should have been dismissed. Specific grounds with citation to the record are particularized in greater detail below.

6. C2G excepts to the ALJ's proposed Remedy, recommended Order and proposed Notice in their entirety inasmuch as C2G has not violated the Act. Decision, p. 18, line 18 to p. 20, line 33 and the attached "Appendix." C2G maintains that the ALJ should have ordered the Amended Complaint be dismissed in its entirety, for the reasons set out with greater particularity in Paragraphs 1-5 above and Paragraphs 7-33 below.

B. EXCEPTIONS TO FACTUAL AND LEGAL FINDINGS

7. C2G excepts to the ALJ's finding "that the accrual of vacation benefits occurred each pay period for nearly three years." Decision, p. 8, lines 29-30. Employees were only mistakenly credited with vacation accrual under Section 18.02 of the CBA for 15 months (i.e., from April 2014 when the first non-grandfathered employee was hired until Carol Huggins caught the mistake in July 2015 and rectified the error). Bd. TR. 66:19-67:6; JX-3, Co. Ex. 11, pp. 1 and 3; JX-7, p. 7, 2nd full paragraph; Bd. TR 70:6-20.

8. C2G excepts to the ALJ's finding that "this practice occurred with such regularity and frequency that Respondent's employees would have reasonably excepted the 'practice to continue or reoccur on a regular and consistent basis.'" Decision, p. 8, lines 30-33 citing, Garden Grove Hosp. & Med. Center, 357 NLRB 653 (2011). The ALJ's conclusion is based on an erroneous assumption that the alleged practice existed for almost 3 years (rather than only 15 months). Bd. TR. 66:19-24; JX-3, Co. Ex. 11, pp. 1 and 3; JX-7, p. 7, 2nd full paragraph; Bd. TR 70:6-20. The ALJ's reliance on Garden Grove is misplaced as that case did not involve an

arbitration award clearly defining what the CBA meant as Arbitrator Ahearn's decision (JX-4, p. 22) does in this case. Alternatively, Garden Grove was wrongly decided or is distinguishable.

9. C2G excepts to the ALJ's finding that:"[T]he fact that employees accrued vacation during the first year of employment under 18.02 unabated for nearly three years is telling. I find that in light of this longstanding practice, the Union's interpretation is eminently reasonable." Decision, p. 9, line 33 to p. 10, line 1. The ALJ's finding is predicated upon an erroneous assumption that the practice existed for "nearly three years" as opposed to a mere 15 months. Bd. TR. 66:19-24; JX-3, Co. Ex. 11, pp. 1 and 3; JX-7, p. 7, 2nd full paragraph; Bd. TR 70:6-20. The ALJ also erred in placing weight on the Union's "interpretation" of Section 18.02 in that this interpretation was considered and flatly rejected by Arbitrator Ahearn. (JX-4, p. 22-23).

10. C2G excepts to the ALJ's finding that "Respondent plainly provided an extra contractual benefit in the form of an additional year of accrued vacation for nearly three years, and that established a past practice of so doing." Decision, p. 10, lines 23-25. The error was for 15 months, not "nearly three years." Bd. TR. 66:19-24; JX-3, Co. Ex. 11, pp. 1 and 3; JX-7, p. 7, 2nd full paragraph; Bd. TR 70:6-20. In addition, no past practice was established under the circumstances of this case where the mistake was the result of a mistake by a person not alleged to be a supervisor or agent,[1] did not have access to relevant information, is not a certified public accountant, does not even have a college degree, picked her job title on her own (JX-5, TR 406:17-22; 356:17-357:6; Bd. TR 54:4-20; TR 56:5-57:13, JX-2, TR 349:20-350:5; TR 384:6-16, TR 390:15-17) and where there is a contrary Arbitrator award as to what the parties actually

[1] The person who erred for 15 months (not 3 years) was Carol Huggins. JX-3, Co. Ex. 11, pp. 1 and 3; JX-5, TR 434:23-435:6. Her name appears nowhere in the Amended Complaint. GC-1.

meant the negotiated CBA to mean. (JX-4, p. 22-23). Finally, no employee ever took the alleged vacation benefit and anyone who tried to take it was told "no." JX-3, Co. Ex. 11, pp. 1 and 3, JX-7, p. 12, last paragraph, JX-5, TR 293:20-25; TR 306:18 to 308:6.

11. C2G excepts to the ALJ's entire analysis of the meaning of Section 18.02 and the possible application of past practice. Decision, p. 10, lines 1-19. The ALJ's interpretation of the CBA is irrelevant and inconsistent with Supreme Court and Board precedent in light of Arbitrator Ahearn's interpretation of Section 18.02 of the CBA. JX-4, p. 22.

12. C2G excepts to the ALJ's finding that:

> "I find that contractual and statutory issues are not factually parallel to the alleged unilateral charge before me. In addition, because the arbitrator declined to factor in evidence of clear and longstanding past practice, his interpretation of Section 8.02 is 'not susceptible to an interpretation consistent with the Act.'"

Decision, p. 7, lines 38-41.

Because of Arbitrator Ahearn's finding that the CBA was clear and unambiguous, Board precedent establishes that past practice should not be consulted. This case was tried almost exclusively upon a stipulated record consisting of the evidence and exhibits adduced at various arbitrators (JX-1) including the Transcript and Exhibits developed before Arbitrator Ahearn (JX-2 and JX-3), so factually they are parallel. Indeed as stated in Exception 11 above, the ALJ analyzed and interpreted Section 18.02 as did Arbitrator Ahearn -- albeit the ALJ's interpretation was incorrect.

13. C2G excepts to the ALJ's reliance on past practice as to the meaning of Section 18.02. Decision, p. 7, lines 17-21; p. 9, line 32-p. 10, line 19. It is contrary to Arbitrator Ahearn's construction of the CBA as clear as unambiguous (JX-7, p. 22) and is therefore

contrary to Board precedent precluding reliance on past practice when the CBA is clear and unambiguous.

14. C2G excepts to the ALJ's reliance on case law dealing with benefits outside the CBA (Decision, p. 7, lines 23-31; p. 8, lines 18-27), because in the instant case the benefit at issue (vacation accrual) is unambiguously addressed by the CBA (JX-3 at Jt. Ex. 1, Sections 18.01 and 18.02) which Sections have been interpreted by Arbitrator Ahearn JX-7, pp. 22-23.

15. C2G excepts to the ALJ's implied determination that Section 18.02 could be interpreted as allowing for vacation accrual from the beginning of employment (Decision, p. 10, lines 13-19) as (a) being contrary to Arbitrator Ahearn's Award (JX-7) and (b) an incomplete analysis as Section 18.02 cannot be properly interpreted without reference to Section 18.01, which is ignored by the ALJ.

16. C2G excepts to the ALJ's failure to recognize anywhere in her decision that C2G's actions were always predicated upon a reasonable and good faith construction of the CBA and the offer letters. JX-4 and JX-7; Bd. TR 74:17-TR 76:8; TR 45:3-5; TR 61:3-7; JX-5, TR 406:17-22; 434:23-435:6; 425:8; 421:1-424:2.

17. C2G excepts to the ALJ's finding that "in mid-July 2015, Copeland discovered Huggins had been granting all bargaining-unit employees leave accrual during their first years [sic] under Section 18.02 … Copeland determined that allowing vacation to accrue under Section 18.02 in the first year was a mistake." Decision, p. 5, lines 21-25. Huggins discovered her error and corrected it on her own. JX-3, Co. Ex. 11, pp. 1 and 3. Copeland only learned of her error upon the filing of the Smith grievance. JX-2, TR 389:10-390:14; TR 379:21-380:14, Bd. TR 74:17 to TR 75:21; JX-5, TR 389:21-390:10; Bd. TR 102:18-21; JX-5, TR 420:24-421:23.

18. C2G excepts to the ALJ's failure to defer to Arbitrator Ahearn's Award (JX-7). Decision, p. 6, line 11 to p. 7, line 41. The ALJ's decision is contrary to Supreme Court and Board precedent and relies upon inapposite cases.

19. C2G excepts to the ALJ's conclusion at fn. 20 (p. 11) of the Decision, that Arbitrator Ahearn concluded certain employees were "part time." Arbitrator Ahearn reached no such conclusion; he simply concluded that they were covered by Section 18.02 of the CBA (JX-4) for purposes of vacation accrual. Arbitrator Snider concluded they were part-time albeit not part-time seasonal. (JX-7, pp. 2, 17-20). C2G does not disagree, however, that labeling people part-time was not material.

20. C2G excepts to the ALJ's finding at fn. 26 (p. 15) of her decision that "Arbitrator Ahearn ordered reclassification of the employees named in the collective grievance to full-time status." Arbitrator Ahearn made no such order. He simply found that they were covered by Section 18.02 of the CBA. (JX-7)

21. C2G also excepts to the implication in fn. 26 (p. 15) of the Decision that Arbitrator Snider merely found that Respondent "could hire part-time employees." Arbitrator Snider found that every employee involved in the grievance before him to be a part-time employee (JX-7, pp. 2, 17-20), albeit not a "seasonal part-time employee".

22. C2G excepts to the ALJ's conclusion that General Counsel met her burden of establishing that any change to vacation accruals were "material, substantial and significant." Decision, p. 11, lines 1-9. They were not.

23. C2G excepts to the ALJ's finding that Michael Smith did not learn that he was accruing vacation at the part-time seasonal rate of Section 18.01 until September 4, 2015.

Decision, p. 15, lines 23-24. This is contrary to the ALJ's own (correct) finding that in mid-July, 2015 Smith left C2G's employ and was not paid vacation under Section 18.02 for his first year of employment and that the Union filed a grievance on August 15, 2015 seeking vacation pay for Smith that first year of employment. Decision, p. 5, lines 22-28. *See also* Bd. TR 73:10-14, JX-4, p. 10; JX-3, Co. Ex. 11, pp. 1 and 3.

24. C2G excepts to the ALJ's failure to address the argument that any claim that C2G violated Section 8(a)(5) by determining that Section 18.02 of the CBA did not allow for vacation accrual the first year of employment, was barred by Section 10(b). In sum, as stated in ¶23 above, the Union knew no later than August 15, 2015, that C2G was of the view that Section 18.02 did not allow for vacation accruals the first year of employment. Decision, p. 5, lines 22-28; Bd. TR 73:10-14; JX-4, p. 10. No charge challenging this view was served until February 18, 2016, which was outside the applicable limitations period. GC-1, Charge No. 19-CA-169910; Amended Complaint ¶1(b).

25. C2G excepts to the ALJ's finding that the allegations concerning the offer letters were not time barred. Decision, p. 15, lines 10-38. As the ALJ properly found, the Union knew of the language in the letters since at least May 2014 for all employees (if not earlier). Decision, p. 15, lines 12-14. No Charge regarding the letters was filed until November 4, 2015. GC-1, 19-CA-163444; Amended Complaint ¶1(a).

26. C2G excepts to the ALJ's finding that in 2014 and 2015 "Copeland issued offer letters to bargaining-unit employees stating" … the employee has 'no contract or other guarantee of employment or employment terms.'" Decision, p. 14, line 5 and line 8. The letter utilized in 2014 and 2015 simply state "[N]either this letter nor the previous signed Employee Guidelines

are intended to create a contract or other guarantee of employment." Decision, p. 14, lines 18-19. See also, JX-3, UX-31. In sum, the offer letters simply disclaim that the offer letters and the Guidelines are contracts -- not that there is "no" contract or other "guarantee of employment", period.

27. C2G excepts to the ALJ's apparent belief and conclusion that C2G has treated non-probationary employees as at-will or that language in the letters could be reasonably construed as more than simply disclaiming that the offer letters and Employee Guidelines do not alter at-will status. Decision, p. 15, lines 1-2; p. 19, lines 11-12. This belief and conclusion is unsupported by the record evidence. (Bd. TR 59:21-61:2).

28. C2G excepts to the ALJ's finding that:

> Once Smith's offer letter was relied upon to assert that he, and the latter most of the bargaining-unit employees, should accrue vacation at the part-time seasonal rate, however, I find the employees would reasonably be coerced by the terms of the offer letters identified above…. At this point from the employees' perspective, what they believed was their bargained-for right to vacation accrual under the terms of the CBA was now being trumped by the part-time language in their offer letters. That language was utilized to change a term and condition of their employment. It would be reasonable and quite logical, for the employees to believe the offer letters had taken on a new and heightened significance and, that the letters' terms could, notwithstanding the handbook and contract language that the CBA prevails, be used by the Respondent to circumvent the CBA.

Decision, p. 16, line 37 to p. 17, line 2.

A reasonable employee would not reach these conclusions under all the relevant circumstances of this case. JX-3, UX-26, 31 and 35; Bd. TR 58:5-59:2; JX-2, UX-35; JX-6, JX-1 thereto, Section 5.02, JX-4, JX-7.

29. C2G excepts to the ALJ's agreement with General Counsel's argument that "by specifically referencing the CBA's economic terms while reserving the right to unilaterally change any other employment terms, a reasonable employee reading the offer letter would be left with the impression that Respondent could and might violate the CBA's non-economic provisions." Decision, p. 17, fn. 289. This argument ignores the overwhelming record evidence (which a reasonable employee would be aware) that C2G fully recognized the supremacy of the CBA and would honor its terms. JX-4, JX-7, JX-6, Jt. Ex.-1 thereto, Section 5.02; Bd. TR 58:3-59:2; TR 76:23-77:1; TR 77:16-22; TR 78:3-20; TR 60:9 to 61:2; TR 59:21-61:2; TR 60:20 to 61:2; JX-2, UX-35; JX-3, UX-26, 31, 35.

30. C2G excepts to the ALJ's implicit finding that C2G engaged in direct dealing when it offered Tuiletufga and Finney part-time positions when at the time they were grandfathered full-time employees. Decision, p. 17, lines 25-27. This finding ignores that Arbitrator Snider found C2G's conduct was consistent with the CBA. JX-7, pp. 2, 17-20. This finding ignores that both men voluntarily chose to bid on positions via the CBA's negotiated bidding process, without impacting their first year of vacation accrual. Bd. TR 72:12-21; JX-6, Co. Ex. 17; Bd. TR 65:3-21; JX-6, Jt. Ex. 1; Bd. TR 59:5-12; JX-6, Co. Ex. 13; Bd. TR 70:21-71:6.

31. C2G excepts to the ALJ's implicit finding that the offer letters to non-incumbent employees (i.e., applicants) constituted direct dealing. Decision, p. 17, lines 27-35. This conclusion ignores Board law that applicants are not represented employees. It also ignores Arbitrator Snider's ruling that C2G could and did hire the employees as part-time and that C2G could enter into agreements with employees so long as the agreement did not conflict with the

CBA (JX-7, pp. 2, 17-20). This conclusion also does not fairly characterize the entirety of the offer letters, which recognize the existence of a CBA and limit C2G's right to act unilaterally to that authorized by law (which would include, amongst other laws, Section 301 and the Act itself). JX-2, UX-35; JX-3, UX-26, 31, 35; Bd. TR 58:3-59:2; TR 60:20-61:2.

32. C2G excepts to the ALJ's Order that C2G "remove from its files all employment letters Respondent has issued to its represented employees since 2014 … and inform all affected Unit employees that this has been done and that their signatures accepting such offer letters will not be used against them in any way." Decision, p. 20, lines 7-11. C2G is required to have signed offer letters in accordance with the National Industrial Security Program Operating Manual which governs government security clearances and that C2G can be cited for not maintaining same. Bd. TR 52:8-53:5; JX-5, TR 389:5-8; TR 384:18-385:11; JX-6, Co. Ex. 5. This ruling also disregards Arbitrator Snider's ruling that C2G could use offer letters and that all employees hired beginning 2014 were hired as part-timers in accordance with the CBA and that consistent with the CBA Finney and Tulietufuga voluntarily changed their status from grandfathered full-time to part-time. (JX-7).

33. C2G excepts to the ALJ's direction that it "restore all of its represented employees' accrued vacation leave, including any vacation leave employees accrued at the Section 18.02 rate during their first years of employment…" Decision, p. 20, lines 1-3 (emphasis added). First, this directive is contrary to Arbitrator Ahearn finding as to what Section 18.02 means (i.e., when accruals begin). (JX-4, pp. 22-23). Second, it is not limited to employees working in September 2015 -- therefore, the directive ignores the right of C2G to hire "part-time seasonal employees" per Section 18.01 of the CBA. JX-3, and Jt. Ex. 1 thereto. Third, it grants a

remedy to employees working under Section 18.02 that could not have relied upon any supported action by Huggins (because they were hired after September 2015 and indeed after Arbitrator Ahearn issued his ruling as to Section 18.02's meaning. (JX-4, p. 22-23). Fourth, any remedy as to the 2015 employees should be limited as suggested by Member Hayes in fn. 4 of Garden Groves (i.e., up until the point Huggins discovered her mistake in mid-July 2015). JX-3, Co., Ex. 11, pp. 1 and 3.

Respectfully submitted,

THOMPSON COBURN LLP

By: /s/ Timothy J. Sarsfield

Charles M. Poplstein
Timothy J. Sarsfield
One US Bank Plaza, Suite 2700
St. Louis, MO 63101
(314) 552-6000
(314) 552-7000 (fax)
cpoplstein@thompsoncoburn.com
tsarsfield@thompsoncoburn.com

Attorneys for C2G LTD. Co.

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2018, the foregoing Respondent's Exceptions To The Decision Of The Administrative Law Judge has been served, as indicated, by electronic mail, and through the National Labor Relations Board Online Portal:

Ronald K. Hooks (Portal)
Regional Director
National Labor Relations Board
Region 19
915 2nd Avenue, Suite 2948
Seattle, WA 98174-1006

David Schaff, Esq. (E-mail and Portal)
Counsel for General Counsel
National Labor Relations Board
605 West 4th Avenue
Suite 210
Anchorage, AK 99501-1936

Elizabeth DeVleming (E-mail and Portal)
Counsel for General Counsel
National Labor Relations Board
Region 19
2948 Jackson Federal Building
915 Second Ave.
Seattle, WA 98174

John Marton (Portal and E-mail)
Business Agent
Teamster Local 959
520 East 34th Ave.
Anchorage, AK 99503

Office of Executive Secretary (Portal)
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

/s/ Timothy J. Sarsfield